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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 10,951.

ROSE PUBLICKER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review the Decision of the Tax Court of the United States.

PETITION FOR REHEARING ON BEHALF OF PETITIONER AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR REHEARING ON BEHALF OF ROSE PUBLICKER, TAXPAYER PETITIONER.

The taxpayer, petitioner on review from the Decree of the Tax Court of the United States, respectfully requests that the Court grant a rehearing of her petition to review the decision of the Tax Court and submits that the question presented is of such importance and novelty as to warrant hearing and determination by the Court *en banc*. Judge Goodrich dissented to this Court's affirmance of the Tax Court in an important feature of this case, to which the first three of the following points are directed—and on that aspect of the case the decisions of both this Court and the Tax Court were grounded largely on a prior decision of the Tax Court, to which, of those judges who sat, six judges dissented.

Rehearing is requested on the following grounds:

1. The Court's determination of what it styled the more difficult of the two problems presented by the case indicates (Opinion, page 9) that the Court regarded as decisive Section 2689 of the Internal Revenue Code which was not argued before the Court, and which moreover we believe can be demonstrated to be irrelevant and has, we submit, been erroneously interpreted in the Opinion.

2. The Court based its determination upon the premise that inasmuch as the property must be valued as a sale the amount of the excise tax must be included because "both the buyer and the seller would have in mind and necessarily would calculate the amount of the excise tax as part of the cost of the property" (Opinion, page 12).

Petitioner's argument at pages 19-20 of her original brief, which demonstrates the fallacy of this premise, did not receive the Court's notice.

3. As respects the 1945 gift, the Court included as part of fair market value a Federal excise tax which was neither

the tax rate which would have been applied at the time of the gift nor the amount of tax which would have been charged at the time of purchase based on the fair market value as found by the Tax Court and approved in the Opinion. The Court has therefore accepted as a standard of value, an amount arrived at by a method contrary to the Gift Tax Act and to the Regulations and in so doing has apparently not considered petitioner's argument on page 20 of her original brief.

4. Finally, as a ground admittedly of less general or widespread significance, although of course of vital importance to petitioner, in affirming the Tax Court's determination of value (irrespective of the question of the excise tax) the Opinion erroneously stated petitioner's position as being that the only ready market in the field of large diamonds is among dealers. The Opinion disregarded the testimony of petitioner's witnesses which clearly established that the values set by the dealers contemplated sale to anyone, including individual buyers. Their testimony, constituting the only evidence in the case of a market for large diamonds, was disregarded by this Court, which substituted its speculation as to the existence of "another market." It is submitted that the foregoing constitutes such disregard of petitioner's evidence of value as to make the conclusions clearly erroneous.

Respectfully submitted,

EARL JAY GRATZ,
Attorney for Petitioner.

Certificate.

I hereby certify that the foregoing petition is in my opinion meritorious, is presented in good faith and that it is not interposed for the purposes of delay.

EARL JAY GRATZ,
Attorney for Petitioner.

PETITIONER'S BRIEF IN SUPPORT OF HER PETITION FOR REHEARING.

The opinion of the Court, written by Chief Judge Biggs, was concurred in by Judge Maris. (Judge Goodrich filed a dissenting opinion in which he objected to the addition of the United States excise tax to the sale price in ascertaining value. The phase of the case discussed in the dissenting opinion is the basis of petitioner's first three objections now urged for the attention of the Court *en banc.*)

The question is a novel one. The decision of the Tax Court, which this Court affirmed, had on this point been based entirely upon the decision of the Tax Court in *Estate of Frank Miller Gould v. Commissioner,* a case of first impression in which six members of the Tax Court dissented.[1] Only one appellate court, The Court of Appeals for the Second Circuit, in a case involving plainly distinguishable facts, has considered the question presented here, viz:

> In the determination of the value of gifts for tax purposes, may an amount additional to the fair market value and representing Federal excise tax paid upon the original purchase by donor in addition to the original price, be added to fair market value as found at the time of the gift?

The facts are stated briefly on pages 2-4 of the opinion.

1. The Court's determination of what it styled the more difficult of the two problems presented by the case indicates (Opinion, page 9) that the Court regarded as decisive Section 2409 of the Internal Revenue Code, which was not argued before the Court. We believe this section

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1. Strong dissenting opinions were written by Judges Disney, Harron and Johnson. Judges Arundell, Van Fossan and Arnold each concurred in one or more of the dissents.

can be demonstrated to be irrevelant and we submit that it has been erroneously interpreted in the Opinion.

The ultimate question in the case is the determination for the purposes of the gift tax of the value of the gifts. The gift tax on jewelry is assessed against "the value thereof at the date of the gift."[2] The Regulation provides that the value of the property is the price at which such property would change hands between a willing buyer and a willing seller.[3] The crucial question is therefore what is the price at which the gift would have changed hands on the date of the gift. The Excise Tax Act imposes on jewelry sold at retail a tax equivalent to 20% (prior to 1944, 10%) of the *price* for which sold.[4] Despite this plain statutory recognition of the fact that the tax is additional to price and added to the price, the Court points to a section of the Act which has no purpose other than to require the tax to be passed on to the purchaser (by preventing the seller from representing that it is not passed on) and invokes this clause as demonstrating that the Excise Tax law requires that the value of the property plus the excise tax constitute price.

Section 2409 provides:

> "*Penalty for representation that tax is not passed on.* Whoever in connection with the sale or lease, or offer for sale or lease, of any article, taxable under this chapter, makes any statement, written or oral, in advertisement or otherwise, intended or calculated to lead any person to believe that the price of the article does not include the tax imposed by this chapter, shall on conviction thereof be punished by a fine of not more than $1,000."

It seems clearly evident that the Congress did not intend, in using the word *price* in a general sense in Section

2. Internal Revenue Code, Sec. 1005.
3. Regulations 108, Sec. 86-19(a).
4. Internal Revenue Code, Ch. 19, Sec. 2400.

3409, to establish a concept which should override the plain words of Section 3400. Indeed, unless price is determined before the tax, there is nothing upon which the tax can be calculated. Section 3405 provides that, *in determining for the purposes of the Act* the price for which an article is sold, the amount of tax imposed whether or not stated as a separate charge shall be excluded.

The Court's view is plainly at odds with this Section. The Opinion states (at page 10):

> "The words quoted apparently mean *that for purposes of the taxes* Congress wished the advertised or stated price of the articles covered by the tax to include the amount of the tax. In short, there is to be one price for the article which is to include the tax and, in effect, it is up to the seller to show inside a number of the purchasing public are concerned." (Italics supplied.)

It is submitted, however, that by reason of Section 3405 the contrary is plainly true. Congress obviously contemplated the establishment of a price by a retailer to which the taxes would be added as a percentage thereof and Congress expressly sanctions the usual and customary business practice of separately stating the tax and in fact requires it in the retailer's return. The only possible reason for Section 3409 and the intent of the Congressional intent as evidenced by its title, was to prevent misrepresentation by sellers that the tax was not being passed on, i.e., to misrepresentation that the tax would be paid out of the seller's profit. If the seller were permitted to absorb the taxes as a matter of choice, the argument might be made for the Court's conclusion that the tax is somehow added to the value of the article. Under Section 3409, however, the seller must appreciate the fact that the seller has not paid and cannot pay the tax, which to the contrary is required to be passed on to the buyer in addition to the price paid the dealer. To construe this section as intended to determine what is value for all tax purposes is so evidently to exten the pass

meaning of the Act as to be in effect to write a new section. The stated Congressional purpose is to prevent the seller from representing that he is absorbing the tax. The conclusion read into it by the Court (Opinion, page 13) that "Congress had in mind the consistent statutory pattern whereby the amount of the excise tax should be included in ascertaining the value of an article . . ." is not even remotely indicated by the Section.

The Court pointed out (Opinion, page 11):

> "it is indeed an odd conception to say that an excise tax is part of the value of an article whether the tax be paid or unpaid."

It seems an even less justifiable conception to say that an excise tax must be *included* as part of the price of an article for the purpose of an Act which expressly states that for the purposes of the Act the price shall *exclude* the tax, especially when the tax cannot be calculated in the first place until the price has been determined.[5]

2. The Court based its determination upon the premise that inasmuch as the property must be valued as a sale, the amount of the excise tax must be included because "both the buyer and the seller would have in mind and necessarily would calculate the amount of the excise tax as part of the cost of the property" (Opinion, page 12).

Petitioner's argument at pages 19-20 of her brief, which demonstrates the fallacy of this premise, received no notice in the opinion.

Basic to the Court's decision is the conception that the excise tax is part of the price, but in arguing that both the buyer and seller would necessarily calculate the amount

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5. In a special ruling published by telegram on December 20, 1949 (505 CCH, Sec. 6062) the Commissioner advised that the Excise Tax Law upon furs did not prohibit a retailer from advertising fur coats at stipulated prices subject to 20% federal excise tax, the price tag including the promise to give credit if the tax were reduced or repealed within a specified period of time. The promise was regarded merely as a *price* adjustment resulting in redetermination of tax liability on the basis of a revised sale price. This ruling is plainly contrary to the present decision.

of the tax as part of the cost, the Opinion is led to a conclusion which is contrary to fact and contrary to economic theory. The tax forms no part of a private sale so that if petitioner had sold the stones rather than made gifts of them there would have been no excise tax paid. Yet the value of the stones could in no sense be said to be changed merely because they were given rather than sold to an individual.[6] Moreover, the excise tax by definition is not a part of the price demanded by the seller and paid by the buyer, even in a retail sale. To the contrary, the seller must determine his price and then apply the percentage in order to determine the excise tax. The retailer obtains no benefit from the tax which he merely collects for the Government.

As was pointed out at page 20 of petitioner's brief, but not disposed of by the Opinion:

> ". . . in considering what is meant by a 'willing seller' in the definition in Regulations 108 Section 86.19, we must recognize that the seller in a retail sale has become induced or willing to part with his property, knowing full well that he will receive therefor only the

6. If petitioner, instead of giving the 1947 gift to her daughter, had on the date of the gift sold it to a stranger for exactly the same price that she had paid for it five months previously, viz. $200,000.00, the transaction would, of course, have involved no excise tax inasmuch as the tax applies only to a retailer. If her purchaser immediately made a gift of the stone and declared its value for gift tax purposes as $200,000.00, it is indisputable its declared value would have been immune to attack. Neither the Government nor the Government's witness contended that the fair market value of the 1947 gift in this case was in excess of $200,000.00, *before tax*. It would be preposterous if identical stones both bought at retail for $200,000.00, plus $40,000.00 excise tax, would in a transfer on the same day have a fair market value of $200,000.00 if sold to an individual, but $240,000.00 if disposed of by gift. It could not be reasonably contended in the supposed case that petitioner would have obtained less than fair market value in the private sale merely because she had not recouped the tax paid by her to the retailer. She is not required to pass it on nor is she required to collect the tax for the Government on private sale. She has received the full fair market value, even according to the view of the Government's expert witness, upon receiving the price the dealer charged her, viz. $200,000.00.

Judge Goodrich pointed out in his dissenting opinion (Opinion, page 13) that a series of gifts would not result in added value and considered it an obvious and avoidable incongruity to hold that upon a number of sales the value would be somehow increased by the the amount of tax involved. The foregoing situation presents at least an equally incongruous result which seems clearly to be required by the Opinion.

price charged, and not the price plus the excise tax imposed upon the transaction. It is the price alone therefore that causes the seller to part with his property."

Not only does the Court disregard this self-evident proposition, but it also adopts the contrary as the premise for its conclusion and we submit that the conclusion is therefore clearly erroneous.

3. The statutory guide imposed by Section 1005 of the Internal Revenue Code for the assessed value of a gift is "the value at the time of the gift." As has been shown, the Regulations interpret this as the price at which the property would change hands between a willing buyer and a willing seller. In this instance, the Opinion would substitute as a measure of the value of the 1946 gift the cost to the donor increased by an amount purportedly representing the increase in value of jewelry between the date of the purchase and date of the gift to which is added the excise tax actually paid by the donor on the lesser of these amounts. The anomaly of this conclusion was anticipated in petitioner's brief at page 20, but insofar as is apparent from the Opinion, petitioner's reasoning was ignored. It is evident, however, from the Opinion that the anomaly is avoided only by begging the question. If the excise tax is to be included as a part of value at the time of the gift, it should be calculated at 20%. The Court did not seek to impose this rate of tax, yet the 10% rate did not apply at the time of the gift. On the other hand, assuming that the tax actually paid for the purchase of the ring was a part of the cost, what basis in logic is there for disregarding this tax as a part of the cost in determining the alleged extent to which diamond prices have been inflated by the time of the gift? By this means the Court does, it is true, avoid the dilemma of assessing a fictitious amount of tax, but in so doing it is inescapably applying inconsistent standards in determining value. If the cost at the time of the purchase repre-

sented value then, an increase in value should be applied to the total cost. What the Court seems to have concluded is that the original tax, while a part of cost, was not a part of value for the purpose of determining present value, but must nevertheless be considered a part of value to the extent it was actually paid.

This, it is submitted, renders Regulations 108, Section 86-19(a) meaningless inasmuch as value is by definition there declared to be the price at which the property would change hands on the date of gift. If the excise tax paid by the donor became a part of cost, this cost, which the Court has stated becomes the price, will be the only logical base to which to apply any inflationary increase in value for the purpose of determining the price as of the date of gift. The result reached by the Opinion has no warrant in the Regulations. In fact, as the Opinion points out a companion section of the Regulations expressly applies to the valuation of gifts of stock the rule urged by petitioner. Nothing in the Regulations prevents this Court from giving to Section 86-19(a) in this case precisely the same effect which the Commissioner has more explicitly applied to stocks in Section 86-19(c). There would be no reason to refer the question back to Congress as was suggested in the Opinion at page 12, if the Opinion had not strained a "Congressional intent" out of Section 2409 which has no clear basis in either Act or Regulations.

4. It is not petitioner's purpose to reargue the evidence. Suffice it to say that petitioner's witnesses placed values upon the diamonds which represented the retail price to *anyone,* including to an individual for personal use. The witnesses, therefore, contemplated a sale to just such an individual buyer as petitioner. Petitioner did not argue and there is no justification for the conclusion that there is no market for large diamonds. The evidence is plain, however, that the individual buyer for large stones is a rarity and that only a dealer can expect to develop a market for

such a gem. Even then buyers are not easily or frequently found. Both of petitioner's purchases had been made from dealers. But it is perfectly plain from previous decisions of the courts that an isolated sale does not constitute evidence of a market.

The opinion departed from the evidence and entered the field of sheer speculation when it stated "the possibility of a more favorable private sale cannot be entirely eliminated" (Opinion, page 6), and that "cost and market value realizable on the sale of the diamonds to an individual for his personal use might well have been substantially the same" (Opinion, page 7).[7] The evidence was entirely to the contrary.

CONCLUSION.

It is respectfully submitted that the importance of the question of whether the Federal excise tax can be properly added to price to determine value for gift tax purposes justifies rehearing of this case by the Court *en banc*, and that the strong dissents by six members of the Tax Court to the initial statement of the challenged principle, as well as the terse and positive disapproval by Judge Goodrich in this case, emphasize the serious doubt still existing as to the correctness of the decision and we earnestly submit that rehearing and reconsideration should be granted upon the foregoing grounds.

EARL JAY GRATZ,
Attorney for Petitioner.

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7. As was demonstrated *supra* in footnote 6 on a sale by petitioner to an individual there would be no tax. Excise tax, to whatever extent it figured as part of petitioner's "cost", is not a part of the fair market value in either a private resale or a gift.

[fol. 110] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,951

ROSE PUBLICKER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

SUR PETITION FOR REHEARING

Present: Biggs, Chief Judge, and Maris and Goodrich, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court: Biggs.

Dated: August 19, 1953.

(Received and filed Aug. 19, 1953, Ida O. Creskoff, Clerk.)

[fol. 111] United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Tax Court of the United States, Greeting:

Whereas, lately in the Tax Court before you or some of you, in a cause between Rose Publicker, Petitioner, (Petitioner on Review) and Commissioner of Internal Revenue, Respondent (Respondent on Review) Tax Court Docket No. 28,356—a decision was entered in the Tax Court on August 21, 1952, which decision is of record in the office of the said Tax Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by inspection of the record of the said Tax Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of a petition by Rose Publicker agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

July 16, 1953.

(Received and filed Aug. 25, 1953, Ida O. Creskoff, Clerk.)

[fol. 112] [Endorsed:] Tax Court Docket No. 28,356. No. 10,951. Rose Publicker, Petitioner on Review vs. Commissioner of Internal Revenue, Respondent on Review. Mandate. (Received and filed August 25, 1935, Ida O. Creskoff, Clerk.)

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Signed and sealed this 25th day of August in the year of our Lord one thousand nine hundred and fifty-three.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

[fol. 113] Clerk's Certificate to foregoing transcript omitted in printing.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 470

ROSE PUBLICKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 92–103) is reported at 206 F. 2d 250. The memorandum findings of fact and opinion of the Tax Court (R. 81a–84a) are not reported.

JURISDICTION

The judgment of the Court of Appeals (R. 104) was entered July 16, 1953. A petition for rehearing (R. 105–116) was denied August 19, 1953 (R. 117). The petition for a writ of certiorari was filed November 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the evidence supports the findings of the Tax Court as to the value, for gift tax purposes, of certain gifts of jewelry made by taxpayer to her daughter.

2. Whether the court below erred in approving the Tax Court's inclusion of federal excise taxes, paid by taxpayer at the time of purchase, in the value of the gifts involved.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

CHAPTER 4—GIFT TAX

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *

(26 U. S. C. 1946 ed., Sec. 1000.)

SEC. 1005. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

(26 U. S. C. 1946 ed., Sec. 1005.)

Treasury Regulations 108, promulgated under the Internal Revenue Code:

> SEC. 86.19. *Valuation of Property.*—(a) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.
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> * * * * *

STATEMENT

In 1946, the taxpayer, Rose Publicker, made a gift to her daughter of a diamond ring which she had purchased in 1941 for the sum of $45,000, plus 10 percent thereof, or $4,500, to cover the retailers' excise tax imposed at the then applicable rate upon the seller by Section 2400 of the Internal Revenue Code, as amended, with respect to the sale. In 1947 the taxpayer made a gift to her daughter of a diamond ring

and a pair of diamond ear clips which she had purchased earlier in that year for the sum of $200,000, plus 20 percent thereof, or $40,000, to cover the retailers' excise tax imposed at the then applicable rate upon the seller by Section 2400 of the Internal Revenue Code, as amended, with respect to that sale. (R. 81–82.)

In her gift tax return for 1946, the taxpayer reported the 1946 gift to her daughter at a value of $50,000, and in her 1947 return she reported the gift in that year at a value of $121,000. (R. 81.) Thereafter, upon audit, the Commissioner of Internal Revenue determined the value of the taxpayer's gift to her daughter in 1946 to be $100,000 at the date of gift, and the value of her gift to her daughter in 1947 to be $240,000 at the date of gift, the latter figure being the amount paid by the taxpayer, including federal excise tax, for the ring and ear clips a few months previously. The Commissioner thereupon asserted the deficiencies in gift tax here involved. The taxpayer petitioned the Tax Court for a redetermination of her gift tax liability for the two years, and the Tax Court, after a full hearing, found that the value of the taxpayer's 1946 gift to her daughter was $58,500 and that the value of the taxpayer's 1947 gift to her daughter was not less than $240,000. (R. 81–82.) On review these findings were sustained by the court below. (R. 92–103.)

ARGUMENT

1. Section 1000 of the Internal Revenue Code, *supra,* p. 2, imposes a tax, computed in accordance with Section 1001 of the Code, upon the transfer of property by gift. Computation of the tax in accordance with Section 1001, as amended by Section 402 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, requires application of a graduated rate of tax to the amount of all such gifts made during the taxable year. Section 1005 of the Code, *supra* p. 2, further provides that if the gift is made in property, "the value thereof at the date of the gift shall be considered the amount of the gift."

Before the Tax Court, the taxpayer relied primarily upon the opinion testimony of certain diamond merchants and dealers to establish values for these gifts as of the crucial dates in amounts less than the values determined by the Commissioner. The Tax Court, rejecting such testimony, chose to accept the evidence of cost to the taxpayer of the items of jewelry in question as the basis for its determination of value for gift tax purposes. It found the value of the 1946 gift to be $58,500 by adding to the purchase price (*i. e.,* $45,000 plus the federal excise tax of $4,500 collected from her by the dealer), which the taxpayer paid for the ring in 1941, an amount equal to 20 percent of the $45,000, which one of the

taxpayer's witnesses testified represented the appreciation in the value of diamonds of that size between 1941 and 1946. The Tax Court also found the value of the 1947 gift to be not less than $240,000, which was the amount, including the federal excise tax, paid for the ring and ear clips by the taxpayer a few months prior to the date of the gift. (R. 83–84.)

The value of property at a given date for federal tax purposes is a question of fact to be determined from the evidence. *Heiner* v. *Crosby,* 24 F. 2d 191, 193 (C. A. 3d); *Gloyd* v. *Commissioner,* 63 F. 2d 649, 650 (C. A. 8th), certiorari denied, 290 U. S. 633; *Texas-Empire Pipe Line Co.* v. *Commissioner,* 141 F. 2d 326, 327 (C. A. 10th). With respect to gift taxes, Section 86.19 of Treasury Regulations 108, *supra,* p. 3, provides that—

> The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. * * * All relevant facts and elements of value as of the time of the gift should be considered.

In fixing the value of the gifts here in issue, the Tax Court took into consideration all relevant facts and elements of value, and it is clear that its findings are supported by substantial evidence. Accordingly, the only question presented is whether the Tax Court used the proper

criteria, or standards, in making its findings. *Powers* v. *Commissioner,* 312 U. S. 259, 260. It has long been recognized that the price at which property was sold at or near the critical date is cogent evidence of value. *Guggenheim* v. *Rasquin,* 312 U. S. 254, 257–258.

The taxpayer's present criticism of the Tax Court's decision seems not to be so much its failure to find values based on the opinion testimony of her witnesses, as the fact that that court took into consideration, as one of the factors on which it predicated its findings of value, the amount which the taxpayer was required in each instance to pay as federal excise tax imposed upon the dealers from whom she purchased the rings and ear clips (Pet. 4–5). In this respect, the instant case presents the same problem as that presented in *Duke* v. *Commissioner,* 200 F. 2d 82 (C. A. 2d), certiorari denied, 345 U. S. 906, the only difference being that in the latter case the only evidence of value adduced was the price, including excise tax, which the taxpayer paid for the property shortly before the date of the gift. In that case the Court of Appeals for the Second Circuit, as did the court below in the instant case, expressly approved the action of the Tax Court in taking into consideration the federal excise tax paid by the donor in determining the value of jewelry for gift tax purposes.

Taxpayer's attack on the Tax Court's inclusion of the amounts of the federal excise taxes in the

purchase price of the gifts involved in this case is (as it was in the *Duke* case, *supra*) based on the hypothesis that such inclusion results in the imposition of a tax upon a tax (Pet. 4, Br. 8–9). The argument is grounded on a fundamental misconception of the federal retailers' excise tax. Section 2400 of the Internal Revenue Code, as added by Section 552 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, imposes an excise tax on jewelry sold at retail. It is not a tax imposed upon the buyer for the privilege of buying; rather, it is a tax imposed on the seller for the privilege of selling, and it is the person who sells at retail who is required by Section 2403 of the Code to make returns and pay the tax. The pattern of this tax is the same as that of the manufacturers' excise tax imposed by Section 3400 *et seq.*, of the Internal Revenue Code. It is settled that the incidence of such a tax is on the seller and that, when the economic burden of the tax is passed on to the purchaser, it becomes not a tax on the purchaser but merely a part of the total purchase price[1] or cost of the article to such purchaser. *Lash's Products Co.* v. *United States*, 278 U. S. 175; *Shearer* v. *Commissioner*, 48 F. 2d 552 (C. A. 2d). Here, the taxpayer did not pay the federal retailers' excise tax as such, but rather an increased purchase price due to

[1] Cf. Section 2409 of the Internal Revenue Code, which imposes a fine on a retailer who represents that the sale price of the article does not include the tax.

the passing on to her of the economic burden of the tax. Since the Tax Court chose to accept as the best evidence of value at the date of gift the price paid by the taxpayer a few months before in the case of the 1947 gift, and the price paid for the 1946 gift plus an amount representing the increase in market value since purchase in 1941, it cannot be said that the Tax Court used unacceptable standards or criteria as a basis for its findings of value, or that such findings were clearly erroneous.[2]

2. The decision of the court below, approving the Tax Court's inclusion of the federal retailer's excise tax in the purchase price of the gift, is supported by the decision of the Second Circuit in *Duke* v. *Commissioner, supra,* and is not in conflict with the decisions of any other courts. We are advised of only two cases on the point, other than the instant case, *Estate of Gould* v. *Commissioner,* 14 T. C. 414, and *Duke*

[2] We think the court below is in error in suggesting (R. 101) that theoretically, if the Tax Court's position is accepted, each time a diamond is sold at retail it would acquire as an additional value the amount of the excise tax paid by the seller. In the first place, it is difficult to visualize repeated sales *at retail* of the same article. In the event of a subsequent sale at retail, however, the price which would be paid by the purchaser, including tax, would, no doubt, be governed by the market, or what the purchaser would be willing to pay, and the price that the purchaser would pay on a second sale at retail would be cogent evidence of fair market value at that time. This dispels the incongruity envisioned by Judge Goodrich in his dissent below. (R. 103.)

v. *Commissioner, supra.* It is possible that the paucity of litigation on the question is attributable to the rather high exclusions and exemptions allowed by Section 1003 (b) of the Internal Revenue Code, and Section 1004 (a), as amended by Section 455 of the Revenue Act of 1942, c. 619, 56 Stat. 798. Whatever the reason for the lack of such litigation, it is clear that the question is not a frequently recurring one.

CONCLUSION

The decision below is correct, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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